Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 79-1980

GERALD E. THOMAS, d/b/a J & J EXXON; JERRY LUKE, d/b/a K & L MOBILE SIGNS, INC.; BUDDY COBB, d/b/a AAA MOBILE ADS AND SIGNS, INC.; KENNETH HAMMOCK, d/b/a A MOBILE SIGN CO.; ROBERT B. WILLIAMS, d/b/a WILLIAMS AUTO SALES AND LEASING, INC.; and C. B. MITCHELL, d/b/a MITCH'S SIGNS,

Petitioners,

vs.

THE CITY OF MARIETTA, GEORGIA; and MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Gerald E. Thomas, d/b/a J & J Exxon; Jerry Luke, d/b/a K & L Mobile Signs, Inc.; Buddy Cobb, d/b/a AAA Mobile Ads and Signs, Inc.; Kenneth Hammock, d/b/a A Mobile Sign Co.; Robert B. Williams, d/b/a Williams Auto Sales and Leasing, Inc.; and C. B. Mitchell, d/b/a Mitch's Signs petition this Court for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Georgia entered in the case of *Thomas, d/b/a J & J Exxon, et al. v. The City of Marietta, Georgia, et al.*, No. 35879, 245 Ga. 485 (S.E. 2d), Petitioners being the appellants below. The judgment was rendered on the 26th day of February, 1980, and a Motion for Rehearing was denied on March 18, 1980.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Georgia has been reported, and is appended hereto. In addition, for further clarification, the order appealed from the lower court is also appended, as is the order of the Supreme Court denying Petitioner's Motion for Rehearing.

JURISDICTION

The judgment of the Supreme Court affirmed the lower court, and the Motion for Rehearing thereof was denied as shown above. The statutory provision which is believed and contended to confer jurisdiction on this Court to review the judgment by certiorari is 28 U.S.C. Section 1257(3), since a right, privilege and immunity is specially claimed under the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

The question presented is:

1. Are the two ordinances involved, which are lengthy with the pertinent portions of them set out herein, violative of the petitioners' constitutional rights under the constitutional provisions as set out hereinafter?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Paragraph 1 of the Constitution of the United States provides as follows:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility."

The First Amendment of the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment of the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fifteenth Amendment of the Constitution of the United States provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The City Council of the City of Marietta on August 10, 1977 enacted Ordinance No. 3315 which relates to sign regulation. This is known as the MARIETTA SIGN ORDINANCE. Article VI, Paragraph 7(b) provides as follows:

"7. *Portable Displays:*

"b. A permit shall not be valid for a period longer than one hundred twenty (120) consecutive days after which time the portable display shall be removed from the building setback lines of the premises. A permit cannot be renewed nor can a permit be obtained for the same premises

within a period of thirty (30) days after the removal of a portable display from the building setback area or (sic) or the premises."

Thus, the City of marietta, by this provision, allowed the display of a portable sign for a period of one hundred twenty (120) days each, provided there were at least thirty (30) consecutive days of non-display between the periods of display.

On March 14, 1979 the City amended Ordinance No. 3315 by adding paragraph 9 of Article V, to the effect that Ordinance No. 3315 was amended by Ordinance No. 3478.

The amendment reads as follows:

"9. Portable Display Signs are to be permitted only in the following conditions:

"a. Opening or closing of a business, not to exceed thirty (30) days.

"b. Special sale, promotional event, or change of ownership or management, not to exceed twice in any twelve (12) month period, for a maximum of fifteen (15) days.

"c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period.

"d. For traffic direction during road construction or emergency situations.

"e. For political campaigns, for a maximum of thirty (30) days before any election."

It was stipulated between the parties that the Petitioners have standing to challenge the constitutionality of these ordinances.

MANNER OF RAISING FEDERAL QUESTIONS

The petition alleges that the action of the City of Marietta, Georgia, a political subdivision of the State of Georgia, violated the Petitioners' rights under the Federal Constitution hereinabove. These contentions were raised at the first opportunity by Petitioners in the Superior Court of Cobb County in their complaint for injunctive relief. The ruling of the trial court was that the ordinances involved did not violate the constitutional provisions cited. The Supreme Court of Georgia affirmed, and the Motion for Rehearing pointed each and every misconstruction, misinterpretation and error made by such court, including its denial of rights, privileges and immunities granted to Petitioners by the Federal Constitution.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT

Petitioners contend that the two ordinances in question are unconstitutional attempts by the City to extend its police power to the derogation of the Petitioners' constitutional rights. Petitioners concede that by law a city has the right to act in areas where actions are necessary for "public peace, safety, health and like words of police power." *Awtry and Lowndes Co. v. City of Atlanta,* 78 Ga. App. 390. The City has taken the position however, that merely stating a reasonable sounding purpose in the introductory language to the ordinance cures any substantative defects which the ordinances may include. However, it is the substance of the ordinance and its effects as applied which determines the true nature of the ordinance and not the attempted self-serving introductory language.

It is to be noted that the ordinances in question apply only to portable display signs without regard to any type of safety consideration such as flashing lights, message content, or display which might be distracting to motorists or even stability of design. It therefore follows that the ordinances in question are attempts by the City to regulate aesthetics which constitutes the taking of property without due process and the taking of property for public use without compensation. McQuillan, *Municipal Corporations,* §24.382.

Furthermore the fact that the ordinances do allow the signs in question to be displayed for some period of time at all is an admission by the City that the signs in question do not constitute any safety, health, hazard or moral problem. To argue otherwise would be to admit that the City has allowed a nuisance to exist.

The City has in the course of this litigation has relied heavily upon the case of *City of Smyrna v. Parks,* 240 Ga. 699, in support of the argument in favor of the powers of the City. However, it is to be pointed out that the *Parks* case involved an ordinance prohibiting chain link fences in residential yards. Thus, that case is distinguishable from the case at bar on at least four crucial points. First, the opinion pointed out that there was a safety factor involved in the prohibition of chain link fences in that citizens had been cut or scratched by the wire on tope and that firefighters could not adequately have access to residences which were on fire. Second, an ordinance which prohibits a chain link fence in no way interferes with a constitutionally protected area for which there are special safeguards, such as the manner in which a person earns a living, as has been discussed earlier. Third, the base at bar concerns, and the *Parks* case did not, in addition to the already discussed constitutional problems, the one area which has possibly been held to be the dearest

constitutional right of all, namely freedom of speech. Fourth, the ordinance in the case at bar affects a crucial aspect of a citizen's method of conducting his occupation in a commercial area, whereas the *Parks* case concerned regulation of an activity not connected with occupation, but in a residential area. It has already been pointed out that there are traditionally extra constitutional safeguards given to one's occupation. It is submitted that a city's power to regulate fences is in a totally different category from and governed by toitally different guidelines than its right to regulate freedom of speech and dissemination of information.

In *Daugherty v. City of East Point,* 447 Fed. Supp. 290 (1978), the U. S. District Court for the Northern District of Georgia ruled unconstitutional an ordinance of the City of East Point which prohibited the display of "For Sale" signs in front of a house. The court noted that the reason for the adoption of the ordinance was the maintenance of property value and improving aesthetic values. The court also noted that there were other media through which the information contained on the signs could be disseminated. The court nevertheless concluded that "there is no question that plaintiff's first amendment rights are in question here." *Id.*, p. 293. It also ruled that the ordinance was "flagrantly and patently violative of express constitutional prohibition," in that there is no question that the ordinance infringed upon the right of freedom of speech guaranteed under the first amendment. The respondents have argued that there is an exception for commercial speech, wherein the constitutional protections of the first amendment do not apply as greatly to commercial speech as they do to non-commercial speech. It is interesting to note that in the opinion in the *Daugherty* case the court traces the history of this commercial speech

exception and notes that in 1975 the U. S. Supreme Court laid it to rest. The court also noted that the city argued that the passage of this ordinance allowed the city to develop a stable integrated housing pattern. However, the court states that although promoting racial integration was a national policy, nevertheless rights guaranteed under the first amendment cannot be disregarded, inasmuch as such rights were even more compelling than "any national policy." It would appear to follow, then, that such rights under the first amendment are certainly more compelling than the City of Marietta's interest in aesthetics in the case at bar. The right to freely disseminate business information in the form of soliciting was recognized by the Georgia Court of Appeals as early as 1940 in the case of *DeBerry v. LaGrange,* 62 Ga. App. 74. Further in *Wolf v. City of Albany,* 104 Ga. App. 264, the Court of Appeals specifically ruled that freedom of speech cannot be defined and limited by an ordinance which bears no clear and reasonable relation to the health, safety, morals or welfasre of the municipality. The displaying of signs, no less than the raising of a flag, is a natural and appropriate means of conveying information, and therefore unqualified municipal prohibition of this practice is an unconstitutional violation of freedom of speech. McQuillan, *Municipal Corporations,* §24.451

As a follow-up to the *Daugherty* case, the U. S. Supreme Court has ruled that a municipality may not restrict "the free flow of commercial information" by banning "For Sale" and "Sold" signs, since that would be a First Amendment violation. *Linmark Associates, Inc. v. Town of willingboro,* 431 U.S. 85, 52 L.Ed. 155, 97 S. Ct. 1614. While "For Sale" signs are not at issue in the case at bar, there can be no question that the "free flow of commercial information" is central to the issue.

Although the City argues that anyone challenging the constitutionality of an ordinance faces an uphill struggle, it is also time that any ordinance which purports in any manner to control dissemination of information (i.e., freedom of speech) must undergo the closest scrutiny to see if the interest of the City, as indicated by the substantive words of the ordinance, and not the self-serving introductory preamble, outweighs the constitutionally protected rights of individual citizens. The City Council can argue eternally that they are acting under the police power. The fact is that the ordinance allows the signs at some times but not at others, and the only reasonable conclusion is that the individual council members just plain do not like the signs and are trying to regulate them, and their owners and displayers, out of business. It is submitted that the City has shown no overriding justification for abridging constitutional rights of citizens.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX A

In the Supreme Court of Georgia

Decided: Feb 26, 1980

35879. THOMAS, d/b/a J & J EXXON, et al. v. THE CITY OF MARIETTA, GEORGIA, et al.

UNDER COFLER, Presiding Justice.

Appellants here challenge the constitutionality of two sections of the Marietta Sign Ordinance restricting the use of portable display signs.[1] One of the challenged sections sets out the conditions under which such a sign may be used. Marietta Sign Ordinance, Art. V, para. 9: "Portable display signs are to be permitted only in the following conditions: a. Opening or closing of a business, not to exceed thirty (30) days. b. Special sale promotional event, or change of ownership or management, not to exceed twice in any twelve (12) month period, for a maximum of fifteen (15) days. c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period. d. For traffic direction during road construction or emergency situations. e. For political campaigns, for a maximum of thirty (30) days before any election. 9.1 Portable display signs are to be removed from the permitted premises within three (3) days of end of the event or expiration of permit, whichever comes first."

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[1] "Portable Display Sign: A mobile/temporary, electrical or non-electrical sign that is mounted on a trailer type frame with wheels or skids or portable wood or metal frame and not permanently attached to the ground." Sign Ordinance No. 3315, Art. II, para. 30. as amended.

The other challenged ordinance relates to the permit requirements. Marietta S ign Ordinance, Art. VI, para. 7(b): "A permit shall not be valid for longer than a period of one hundred twenty (120) consecutive days after which time the portable display shall be removed from the building setback lines of [sic][2] the premises. A permit cannot be renewed nor can a permit be obtained for the same premises within a period of thirty (30) days after the removal of a portable display from the building setback area or the premises." (Footnote added.)

Appellants claim that these sections amount to an abuse of the police power of the City of Marietta, deprive them of their property without just compensation without due process of law, deny them freedom of speech, and constitute an impairment of contracts. The trial court upheld the constitutionality of the ordinance. We affirm.

1. In *City of Doraville v. Turner Communications Corp.*, 236 Ga. 385 (223 SE2d 298) (1976), we held that a municipality may validly regulate the erection and maintenance of signs. The validity of a particular sign ordinance, however, depends on the reasonableness of its purpose, operation and effect. The general purposes of the ordinance are spelled out in Article I: "The purpose of this Ordinance is to provide standards to safeguard life, public health, property and welfare by regulating the location, size, illumination, erection, maintenance and quality of materials of all signs, and all signs and outdoor advertising structures." Appellants argue that this is an attempt to regulate aesthetics through the police power. We disagree.

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[2]Although the Ordinance in the record says "off", we think "or" must have been intended.

Although aesthetics are an important incidental effect of regulations, Berman v. Parker, 348 U. S. 26 (SC) (1954), aesthetics, being merely a question of subjective taste, would not alone be enough to support the legislation here under the police power. See *City of Smyrna v. Parks,* 240 Ga. 699 (242 SE2d 73) (1978). This ordinance, however, is clearly reasonably meant to regulate signs which are, in their very nature, temporary. See definition in footnote 1, supra. The regulations are designed to prevent the use of these temporary signs where a permanent one would be more conducive to the safety and welfare of the public. We do not find these ordinances arbitrary or discriminatory.

2. Having held that the regulation of these temporary signs is reasonable and within the police power, and noting that, although their use is restricted, it is not prohibited, it follows that there is no merit to appellants' due process, inverse condemnation,freedom of speech, or impairment of contracts claims. Linmark Assoc. Inc. v. Township of Willingboro, 431 U. S. 85 (1977), is distinguishable for this reason.

Judgment affirmed. All the Justices concur, except Marshall, J. who dissents.

APPENDIX B

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

GERALD E. THOMAS, d/b/a J & J EXXON, et al Plaintiffs vs. THE CITY OF MARIETTA, GEORGIA and MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GA., Defendants	]]]]]]]]]]]]]	CIVIL ACTION 79-1603 ORDER

The City of Marietta adopted a comprehensive sign ordinance No. 3315, August 10, 1977:

> "Purpose. The purpose of this ordinance is to provide standards to safeguard life, public health, property and welfare by regulating the *location, size, illumination, erection,* maintenance and quality of materials of all signs and all signs and outdoor advertising structures."

On March 14, 1979, the Marietta City Council enacted Ordinance No. 3478 (Council Bill No. 114479), which amended the comprehensive ordinance No. 3315, specifically concerning portable signs. Ordinance 3478, defines portable display signs as follows:

"*Portable Display Sign:* A mobile/temporary electrical or non-electrical sign that is mounted on a trailer type frame with wheels or skids or portable wood or metal frame and not permanently attached to the ground".

The amendment further provided:

"9. Portable display signs are to be permitted only in the following conditions:

a. Opening or a closing of a business, not to exceed thirty (30) days.

Special sale, promotional event, or change of ownership or management, not to exceed twice in any twelve (12) month period, for a maximum of fifteen (15) days.

c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period.

d. For traffic direction during road construction or emergency situations.

e. For political campaigns, for a maximum of thirty (30) days before any election."

Portable signs erected in violation of Ordinance 3315 are given notice under the following provision:

"*Notice of Violation:* If any sign is erected or maintained in violation of any of the provisions of this ordinance, the City of Marietta shall have the power to give the owner thereof written notice of such violation. Said notice to include a brief statement of the particulars in which this article is violated and the manner in which such violation is to be remedied. If the sign has been registered with the City of Marietta, notice to the registered owner or the person or firm receiving the permit shall be sufficient. If the sign has not been registered and the owner is not known, the affixing of a copy of the notice to the sign, sign structure, or building for a period of ten (10) days shall be sufficient. If a sign

owner cannot be found, the duty to perform corrections or removal of the sign will be upon the property owner on whose property the sign is attached.

a. If such violation is not remedied within thirty (30) days after such violation, the owner shall remove the sign immediately.

b. If the sign is not removed by the owner, the City of Marietta shall have the right to remove such sign at the expense of the owner thereof. The cost of removing the sign shall not be less than twenty-five ($25.00) dollars.

c. If the sign is not removed or corrected after proper notice, a twenty-five ($25.00) dollar fine for each day of continued violation will be imposed by the municipal court."

On April 13, 1979, plaintiffs filed this complaint and sought a temporary restraining order to prevent defendants from enforcing this ordinance. On this same day, this Court grasnted the temporary restraining order until a hearing could be had on the matter on May 2, 1979.

Plaintiffs attack the March 14, 1979 amendment dealing with portable signs as constitutionally void and an unreasonable and arbitrary abuse of its police powers.

CITATION OF AUTHORITIES

Only the March 14, 1979 amendment is brought into question. It should be noted that the amendment restricts the use of portable signs to specific occasions, but does not prohibit their use entirely. The premise of plaintiffs is that those engaged in the sale or rental of portable signs are engaged in a lawful business and that this is a fundamental, natural, inherent, sacred and valuable right of a citizen.

Duberry v. City of LaGrange, 62 Ga. App. 74.

In Awtry and Lowndes Co. v. City of Atlanta, 78 Ga. App. 390, 396, it is stated:

> "The regulation of a lawful business, however, is dependant upon some reasonable necessity for the protection of the public health, safety, morality, or other phase of the general welfare, and unless an act restricting the ordinary occupations of life can be said to bear some reasonable relation to one or more of these general objects of the police power, it is repugnant to constitutional guaranties and void.' Bramley v. State, 187 Ga. 826, 835, 2 S.E.2d, 647."

On page 400, the Court of Appeals also states:

> "Courts interpret the term 'public welfare' with some strictness. It does not include mere expediency, whim, caprice, sentimental objects or *purely aesthetic purposes* nor usually mere convenience. So far as the courts have given utterances expressive of their attitude on these matters it is an open question to what extent 'public welfare', apart from a recognized basis justifying the exercise of the police power, would embrace the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development. But in any event, it is, nevertheless, true that there must be an essential *public* need for the exercise of the police power to justify its use."

The Ga. Supreme Court, in *City of Smyrna v. Parks,* 240 Ga. 699-706 cites with approval *Berman v. Parker,* 348 U.S. 26, 33 (75 S.C. 98, 99, LE 27) (1954):

> "The concept of the public welfare is broad and inclusive. . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."

Thus, a much broader and less restrictive interpretation is presently given to the term "public welfare".

This Court is bound by the decisions of the appellate courts of Georgia. It has been determined judicially that a municipality can enact and enforce *reaonable* regulations governing the erection and maintenance of signs within its jurisdiction. *City of Doraville v. Turner Corp.*, 236 Ga. 385, 387.

Thus, consideration must turn to the question of whether or not the amendment to the ordinance adopted was an arbitrary and unreasonable one.

Again, the ordinance does not *prohibit* - merely provides for specific instances and terms of use.

As in *City of Smyrna v. Parks*, 240 Ga. 699, on page 705, this ordinance apparently has a multiple purpose. That is, safety and general welfare. It is further stated in City of Smyrna v. Parks on page 705:

> "Even if the ground of safety is deemed a tenuous one, however, the ordinance would not be an unwarranted exercise of police power based on aesthetics alone, provided there is a reasonable relationship between the regulation and the legitimate purposes of regulations, as enunciated by the legislature. As was pointed out in Gorieb v. Fox, 274 U.S. 603, supra, the city council, which deals with situations from a practical standpoint, is better qualified than the courts to determine the necessity, character and degree of regulation required by the changing local conditions, hence their conclusions must be *clearly* arbitrary and unreasonable in order to be set aside on constitutional grounds."

The City of Marietta had the constitutional power to adopt the amendment to the general ordinance, and construing the ordinance as amended, it provides reasonable standards for the regulation of signs and is not unreasonable or arbitrary.

THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that the temporary restraining order heretofore issued be vacated and further restraining order be denied.

SO ORDERED, this 23rd day of May, 1979.

L. C. HAMES, JUDGE,
COBB SUPERIOR COURT,
CJC

Clerk's Office, Supreme Court of Georgia

ATLANTA 3/18/80

DEAR SIR:

The motion for a rehearing was denied today:

Case No. 35879. Thomas, d/b/a J and J Exxon et al. v. The City of Marietta, Georgia, et al.

Marshall, J., dissents.

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk